

A Comment on the Estimated Costs of Multi-Jurisdictional Merger Reviews

J. William Rowley and A. Neil Campbell

In September 2000 Assistant Attorney General Joel Klein used the conference celebrating the tenth anniversary of EU merger control as a platform to announce that the United States was prepared to participate in the multinational “Global Competition Initiative” recommended in the Report of the International Competition Policy Advisory Committee.¹ Because multi-jurisdictional merger review was identified as one of the priority areas, the International Bar Association and the American Bar Association Section of Antitrust Law reacted by commissioning a study of the time and costs associated with the proliferation of national merger review regimes. The purpose was to shine a spotlight on the impact of such regulatory systems and to provide a concrete factual foundation for policy debates relating to possible streamlining or convergence of such processes.

PricewaterhouseCoopers LLP published *A Tax on Mergers?—Surveying the Time and Costs to Business of Multi-Jurisdictional Merger Reviews* in June 2003.² The results were presented to the members of the International Competition Network (ICN—the outgrowth of the ICPAC Global Competition Initiative concept) at its Second Annual Meeting in Mérida, Mexico. This analysis complemented the active work program of the ICN’s Merger Working Group, particularly its Notification and Procedures subgroup, which had compiled a general literature survey on cost/burden issues and is in the midst of developing various “Recommended Practices” that are designed to facilitate effective and efficient merger reviews.³ The PwC report is also timely because the EU, US and numerous other jurisdictions are in the process of considering reforms to their domestic regimes.

The PwC report bears careful study. The underlying survey is the first effort to quantify the burdens to businesses related to external costs and employee time that result from the proliferation of multi-jurisdictional merger review processes. Even so, the report understates the total costs associated with merger review because agency costs were not quantified and the opportunity costs of delayed achievement of potential merger synergies due to merger suspension periods were not measured. Nevertheless, the survey results provide a concise basis for informed policy debate regarding the possibility of streamlining the various merger review processes that now exist in over eighty jurisdictions.

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¹ INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE (ICPAC), REPORT TO THE UNITED STATES DEPARTMENT OF JUSTICE (2000). Information about the Report and the manner in which a hard copy can be obtained is available on the U.S. Department of Justice’s Web site at <http://www.usdoj.gov/atr/icpac/icpac.htm>.

² The report is available at <http://www.ibanet.org/news/NewsItem.asp?NewsID=99>.

³ Information about the activities and outputs of the Merger Working Group can be found at <http://www.internationalcompetitionnetwork.org/mergers.html>.

The Survey

With the assistance of working groups from the IBA and the ABA Antitrust Section, PwC developed from several sources a database of 355 companies that had undertaken a transaction requiring review in two or more jurisdictions. It then designed a survey that was conducted through an advance mailing that requested compilation of various cost and other information followed by a telephone interview. Potential survey respondents were identified based on mergers and acquisitions announced during the period 2000 to mid-2002 (although not all announced transactions were completed).

Responses were received from 51 companies (approximately one in seven contacted) covering 62 transactions which involved 382 notifications in 49 jurisdictions. While one might have hoped for a greater number of responses, the data collected covered a diverse range in terms of transaction size, number and location of reviewing jurisdictions, total duration, and total cost (although the working group members felt that the largest number of jurisdictions reviewing a single transaction in the sample (16) was well below what has been experienced in some multi-national transactions).

The Findings

Some of the more notable findings from the survey include:

Deals with a U.S.

second request are

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transaction compared

to those involving

phase II review in the

European Union.

- On average, a multi-jurisdictional deal involved eight completed or considered filings.
- The external costs of multi-jurisdictional review averaged €3.3 million (US\$3.7 million at today's exchange rates). This includes both straightforward phase I and in-depth second request/phase II reviews.
- The external costs of in-depth review (second request/phase II/etc. in at least one jurisdiction) averaged €5.4 million (US\$6.0 million). Underlying this average is an enormous amount of variation, with external costs for the top quartile of transactions averaging just under €15.0 million (US\$16.7 million).
- While internal costs were not measured in financial terms, the estimated amount of time spent by company personnel on regulatory processes ranged from an average of 28 person-weeks for all transactions, to 120 person-weeks for the transactions receiving one or more in-depth reviews (nearly four persons working full time for the average nine month duration of such transactions), to 389 person-weeks (one person full time for over seven years) for the top quartile of transactions surveyed.
- Brazil, followed by the United States, emerged as the jurisdictions most often involving the longest reviews. The average review durations for the transactions where these jurisdictions were last to complete their reviews, were 11.9 and 8.8 months, respectively. Even more alarming is the finding that the slowest reviews (i.e., top quartile) had an average duration of 16 months, which far exceeds the timing objectives of most merging parties.
- Deals with a U.S. second request are the most expensive (and often the most time consuming), with double the average external costs per transaction compared to those involving phase II review in the European Union. A regression analysis of 44 observations by PwC confirmed the robustness of this conclusion.
- Not surprisingly, the largest number of filings were made in the United States (40 of the 62 transactions), followed by the European Union (32). However, the fact that Brazil ranked a close third (31), and that three countries with comparatively small economies attracted a surprisingly high number of notifications (Poland (16), Austria (15), and South Africa (11)),

suggests that nexus requirements and filing thresholds might usefully be examined as part of an effort to determine whether too many transactions are being subjected to too many filings around the world.

- There are virtually no economies of scale in terms of external costs as the number of reviews increases (i.e., doubling the number of filings basically means twice as much cost).
- Lack of consistency between filing requirements of the review regimes in different jurisdictions is seen as a real issue for businesses, with almost 60 percent of respondents identifying scope for improvement and convergence.

The Prospects for Reform

Some officials and members of the antitrust bar have focused on survey responses which indicated that merger review costs were a small fraction of deal value and that they have not deterred subsequent transactions. This misses the point: unnecessary inefficiency is a serious policy concern precisely because the costs are borne by businesses that have no alternative to avoid such regulatory processes. The problem is put in perspective by the ICPAC finding in 2000 that something in the order of 98 percent of all mergers notified in the United States are cleared without any modification to address competitive concerns⁴ (and similarly low challenge rates are believed to exist in most other jurisdictions). It is hoped that the ICN project to establish recommended practices for merger reviews, as well as other domestic initiatives, will reverse the trend of increasing multi-jurisdictional merger review costs.⁵ ●

⁴ See ICPAC Report, *supra* note 1, at 96 (noting “Of the 4,679 transactions notified during the fiscal year ending September 30, 1999, requests for additional information were issued in 113 (2.4 percent), and only 76 transactions (1.6 percent) resulted in enforcement actions. U.S. DOJ Premerger Office.”).

⁵ The ICN 2003–2004 Merger Notification and Procedure Subgroup workplan, which describes its Recommended Practices initiatives is available at http://www.internationalcompetitionnetwork.org/2003-2004_mergersnpsg.pdf.